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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1971

No. 71-1558

PAUL LORIN KANTNER, CLAUDE ERNEST WINTER
and DAVID ALLEN NOWELL,
Petitioners,

VS.

STATE OF HAWAII and ANTONE S. OLIM,
Superintendent of Hawaii State Prison,
Respondents,

On Petition for a Writ of Certiorari to the Supreme Court of Hawaii

BRIEF FOR RESPONDENT ANTONE S. OLIM, Superintendent of Hawaii State Prison

OPINION BELOW

The opinion of the Supreme Court of Hawaii is reported at 493 P.2d 306.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

Whether the regulation and classification of marijuana accomplished by Sections 329-1 and 329-5, Hawaii Revised Statutes, violate the due process or equal protection clauses of the 14th Amendment or infringe on any federally protected fundamental right.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The United States Constitution, Amendment 14, provides in part:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 329-1, Hawaii Revised Statutes, provides in part:

> "'Narcotic drugs' mean any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:
>
> "(1) Opium, isonipecaine, coca leaves, and opiate;
>
> "(2) Any compound, manufacture, salt, derivatives, or preparation of opium, isonipecaine, coca leaves or opiate;
>
> "(3) Any substance (and any compound, manufacture, salt, derivative, or preparation thereof) which is chemically iden-

tical with any of the substances referred to in clauses (1) and (2), including apomorphine or any of its salts;

"(4) Opiates. The word 'opiate' as used in clauses (1) and (2) shall mean any drug having addiction-forming or addiction-sustaining liability similar to morphine or cocaine;

"(5) Marihuana. Marihuana includes the following substances under whatever names they may designate: all parts of the plant cannabis sativa, L., whether growing or not, the seeds thereof, the resin extracted from any part of the plant, and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin, but, shall not include the sterilized seed of the plant which is incapable of germination."

Section 329-5, Hawaii Revised Statutes, provides:

"No person shall knowingly plant, cultivate produce, manufacture, possess, have under his control, prescribe, administer, or compound any narcotic drug as defined by section 329-1 except as provided in this chapter. Any person found guilty of any of the foregoing acts shall be imprisoned at hard labor not more than five years for the first offense and imprisoned at hard labor not more than ten years for any subsequent offense; provided that, every person who possesses any marijuana, except as otherwise provided by law, shall be punished by imprisonment for not more than one year, or for not less than one year nor more than five years.

"If such person has been previously convicted once of any felony offense described in this chapter or has been previously convicted once of any offense under the laws of any other state or of the United States which if committed in this State would have been punishable as a felony offense described in this chapter, the previous conviction shall be charged in the indictment or information and if found to be true by the jury, upon a jury trial, or is found to be true by the court, upon a court trial, or is admitted by the defendant, he shall be imprisoned for not less than two years nor more than ten years, and shall not be eligible for release upon completion of sentence, or on parole, or on any other basis until he has served not less than two years.

"If such person has been previously convicted two or more times of any felony offense described in this chapter or has been previously convicted two or more times of any offense under the laws of any other state or of the United States which if committed in this State would have been punishable as a felony offense described in this chapter, the previous convictions shall be charged in the indictment or information and if found to be true by the jury, upon a jury trial, or if found to be true by the court, upon a court trial, or are admitted by the defendant, he shall be imprisoned for not less than five years nor more than twenty years, and shall not be eligible for release upon completion of sentence, or on parole, or on any other basis until he has served not less than five years."

STATEMENT OF THE CASE

Respondent Olim generally agrees with the Petitioners' summary of the historical background of the case. However, Respondent Olim disagrees that the expert testimony adduced by Petitioners "clearly and unequivocally demonstrated that scientifically, medically, or in fact no basis existed for equating marijuana and narcotic drugs." (Op. Br. 5)

Respondent Olim further disagrees that the court's holding in *People v. McCabe,* 49 Ill.2d 338, 275 N.E. 2d 407 (1971), was the opposite result from that reached by the Hawaii Supreme Court (Op. Br. 6). This is discussed in the Argument herein.

In addition, during the hearing, the State of Hawaii adduced evidence that there is a lack of knowledge about the chemical, physiological and psychological effects of marijuana usage (Tr. 16, 27, 28, 37, 47, 99, 133); that the use of marijuana (a) may create a psychological dependence (Tr. 78, 92, 93, 141, 142, 143); (b) may create social and psychological pressures to experiment with more dangerous, addictive drugs and may facilitate transition to such drugs (Tr. 31, 36, 37, 38, 116); (c) may produce psychosis in individuals with a predisposition to mental instability (Tr. 17, 81, 85, 88, 91, 145, 146); (d) may produce a motivational syndrome of lethargy, self-neglect and non-productivity (Tr. 17, 88, 89, 116, 119, 131, 132); and (e) may cause mental disassociation and intoxication that pre-disposes to anti-social behavior (Tr. 19, 22, 23, 79, 80, 89, 117, 118, 146, 147).

ARGUMENT

I. THE REGULATION OF MARIJUANA ACCOMPLISHED BY SECTIONS 329-1 AND 329-5, HAWAII REVISED STATUTES, IS A REASONABLE EXERCISE OF THE POLICE POWER.

A. The Hawaii State Legislature has provided for markedly different treatment of marijuana than for narcotics, scientifically defined.

Petitioners repeatedly complain that the method of regulation of marijuana accomplished by the statute in question is irrational because it is treated in the same manner as narcotics, scientifically defined.

This argument mistakes the facts.

Petitioners conveniently ignore that, with respect to possession, the offenses here involved, the Hawaii State Legislature has set forth markedly different penalties than it has established for possession of narcotics, scientifically defined. Under Section 329-5, Hawaii Revised Statutes, the convicted possessor of marijuana may be punished by imprisonment for a period of not more than one year as contrasted with a period of not more than five years for possessors of other proscribed drugs.

Thus Petitioners' arguments as to the unreasonableness of classifying marijuana with narcotics rest on a fallacious assumption.

B. The criminal sanction for the possession of marijuana imposed by the statute in question is a reasonable means of discouraging its use which is a valid state objective.

At the outset it must be emphasized that Petitioners conceded below that the State may regulate the use of marijuana under its police power.

The remaining question is whether the manner in which marijuana is regulated is reasonable. If there exists *some* evidence on the basis of which the Hawaii State Legislature could enact the statute, then the statute must stand under the due process clause. *Ferguson v. Skrupa,* 372 U.S. 726 (1963).

There can be little question that Petitioners failed to meet this heavy burden. At best the record indicates that Petitioners were able to show that presently there are widely divergent and hotly disputed theories, studies and opinions concerning the effects of marijuana. This Court, as did the Supreme Court of Hawaii, should leave the weighing of such theories, studies and opinions to the Legislature. As Mr. Justice Black stated in *Ferguson:*

> "We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." (372 U.S. at 730)

Obviously the legislative process, with its ability to weigh such varied viewpoints and then make value judgments, is the process through which Petitioners' contentions should be resolved.

In *Commonwealth v. Leis,* 355 Mass. 189, 243 N.E. 2d 898 (1969), a case also dealing with the prohibition of marijuana, the Supreme Judicial Court of Massachusetts dealt squarely with the question:

> "Where the reasonableness of the legislative finding or the factual basis of the legislative finding is fairly debatable the legislative determination must be sustained . . . That there may

> be an earnest conflict of serious opinion does not suffice to bring matters of legislative judgment within the range of judicial cognizance." (243 N.E.2d at 907)

Nor is imposition of a criminal sanction itself an unreasonable means of regulation. Such sanctions are the traditional, and most effective, means by which the use of dangerous substances is discouraged.

There can be little doubt that the Legislature's purpose of preventing the use of marijuana is a legitimate state objective. In view of the divergent viewpoints regarding the effects of the drug, the Legislature certainly should be able to preclude its use altogether. To do otherwise would be to run a substantial risk with public health before more is known about the drug. Indeed the absence of sound scientific data concerning the long-term effects of marijuana begs for a cautious approach.

C. Mere labeling of marijuana as a narcotic drug does not offend due process.

Petitioners complain that the statute in question classifies marijuana as a narcotic drug, that it is not scientifically a narcotic, and that the statute is therefore unconstitutional.

This contention is without merit.

Mere labeling of marijuana as a narcotic drug is immaterial to a determination of constitutional validity because the statute expressly proscribes its possession. "Narcotic drugs" is not used in any generic sense, but only as expressly defined by Section 329-1,

Hawaii Revised Statutes. The Hawaii State Legislature has broad power to define terms for a particular legislative purpose, and the courts, generally speaking, are obligated to follow legislative definitions rather than commonly accepted dictionary, judicial or scientific definitions. *Bailey's Bakery, Ltd. v. Borthwick,* 38 Haw. 16 (1948).

Use of the word "narcotic" to include marijuana is certainly not misleading because the word in popular usage does include marijuana. Use of the popular rather than the scientific definition does not constitute a violation of the 14th Amendment's guarantee of due process.

II. THE CLASSIFICATION OF MARIJUANA ACCOMPLISHED BY THE STATUTE IN QUESTION IS NOT OFFENSIVE TO THE EQUAL PROTECTION CLAUSE.

Petitioners argue that since Section 329-5, Hawaii Revised Statutes, classifies marijuana with "hard drugs", it violates the equal protection clause.

Their contention is not even one cognizable under the equal protection clause which precludes the states from treating persons who are similarly situated differently. Here Petitioners complain that the statute treats marijuana users in the *same* manner as users of more dangerous drugs, a contention which incidentally is contrary to the facts as has been discussed.

Nonetheless, the real equal protection question should be mentioned because it was dealt with by the

Supreme Court of Hawaii. That question is whether the failure to include alcohol within the same classification as marijuana is violative of equal protection.

As pointed out below, the issue in this regard is not whether marijuana is more like alcohol than heroin but whether there are sufficient dissimilarities to support different treatments.

Far more is known concerning the long-term effects of the use of alcohol than is known concerning the same effects of marijuana. Despite its alleged widespread use, marijuana constitutes a relatively new drug abuse problem. Alcohol, on the other hand, has been a problem for centuries. The wide disparity of knowledge of the drugs alone constitutes a sufficient basis for different treatment.

Additionally, alcohol, unlike marijuana, can be readily manufactured in any kitchen. Indeed, the experience of this country in connection with its prohibition shows that its regulation in that manner may as a practical matter be impossible. The growing and marketing of marijuana on the other hand can be prohibited under the police power of the states.

In any event there can be little question that Petitioners have utterly failed to show that different treatment of alcohol rests on no reasonable basis. That is their burden under the law. *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61 (1911).

III. THE USE OF MARIJUANA INVOLVES NO "FUNDAMENTAL CONSTITUTIONAL RIGHT" AS SUGGESTED BY PETITIONERS AND, EVEN IF IT DOES, THE QUESTION SHOULD NOT BE DECIDED ON THIS RECORD.

It bears repeated emphasis that below Petitioners consistently conceded the State's power to regulate the possession of marijuana, and relied only on the argument that marijuana is not a narcotic and cannot be included in a regulatory scheme dealing with narcotics.

Even if the use of marijuana were included within a fundamental right of privacy, which it is not, the State could nonetheless justify its prohibition by presenting evidence to show that the Legislature could have reasonably concluded that its use is harmful to the general public as well as to the individual user. But, in view of Petitioners' concession, the State had no reason to produce evidence tending to show such facts. Thus, if this question is to be decided by this Court, it should await a record adequate for the purpose.

It is noteworthy that Justice Abe in his concurring opinion refused to decide the issue for this reason, despite his obvious sympathy for the proposition that one enjoys a constitutional right to smoke marijuana. (493 P.2d at 311-313)

In any event, the Supreme Court of Hawaii was clearly correct in holding that an individual's interest in using marijuana is not within the group of interests to which the Constitution affords the highest protection.

Petitioners cite no authority for the novel proposition that the ingestion of marijuana lies within a fundamental right of privacy. They cite *Griswold v. Connecticut,* 381 U.S. 479 (1965), in which this Court extended the zone of privacy to the marital relationship, and invalidated a statute prohibiting the use of contraceptives. But to prohibit invasions of the marital chamber, and thus protect the centuries-old institution, is hardly to authorize the use of mind-altering substances, even in private. The prohibition of marijuana does not operate "directly on an intimate relation of husband and wife" as in *Griswold,* nor does it operate on any other intimate relationship. Further, in *Griswold,* contraceptives were admittedly not harmful to the individual user much less the general public.

Under our system the states, unlike the federal government, are limited in the exercise of their authority only by explicit constitutional limitations on their power. Petitioners must point to some provision of Bill of Rights or elsewhere which can rationally be construed as limiting the power of the states to prohibit the possession of marijuana. They have not and cannot do this.

IV. THERE ARE NO CONFLICTS OF DECISIONS

The Petitioners' contentions have been raised in a number of jurisdictions and have uniformly been decided against them.

In *Raines v. Florida,* 225 So.2d 330 (Fla. 1969), the court held marijuana was within the category of injurious substances which may be prohibited in the exercise of the police power, and that no rights are violated thereby. In *People v. Stark,* 400 P.2d 923 (Colo. 1965), and *Spence v. Sacks,* 173 Ohio St. 419, 183 N.E.2d 363 (1962), the courts held it was not unreasonable to include marijuana within a legislative definition of narcotic drugs and that such action was constitutional. In *Commonwealth v. Leis, supra,* the court followed *Raines, Stark* and *Spence,* and went on to hold there is no fundamental right to use marijuana and that its use is not within a constitutionally protected zone of privacy created by the First, Third, Fourth, Fifth and Ninth Amendments. Finally, in *People v. Aguiar,* 257 Cal.App.2d 597, 65 Cal.Rptr. 171, cert. den. 393 U.S. 970 (1968), a legislative classification of marijuana as a narcotic was upheld as reasonably related to the public welfare.

Petitioners cite *People v. McCabe, supra,* for the proposition that statutes classifying and proscribing marijuana as a narcotic are constitutionally defective. (Op. Br. 6, 14) That case, however, held only that the Illinois Legislature's classification of marijuana under its Narcotic Drug Act, which provided a mandatory ten-year sentence for a first conviction for sale of marijuana, rather than under its Drug Abuse Control Act, which specified a one-year penalty for a first conviction for sale of similarly dangerous drugs, violated equal protection. The court carefully pointed out that the defendant did not contest the power of

Illinois to prohibit the possession of marijuana. The case hardly reached the "opposite result from the Hawaii Supreme Court" as Petitioners state on page 6 of their brief.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Dated, Honolulu, Hawaii,
September 20, 1972.

Respectfully submitted,

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